

Substitute for SENATE BILL No. 204

AN ACT concerning the waters of the state; relating to classified stream segments and designated uses of classified stream segments.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act:

(a) (1) “Classified stream segments” shall include all stream segments that are waters of the state as defined in subsection (a) of K.S.A. 65-161, and amendments thereto, and waters described in subsection (d) of K.S.A. 65-171d, and amendments thereto, that:

(A) Are indicated on the federal environmental protection agency’s reach file 1 (RF1) (1982) and have the most recent 10-year median flow of equal to or in excess of 1 cubic foot per second based on data collected and evaluated by the United States geological survey or in the absence of stream segment flow data, calculations of flow conducted by extrapolation methods provided by the United States geological survey;

(B) have the most recent 10-year median flow of equal to or in excess of 1 cubic foot per second based on data collected and evaluated by the United States geological survey or in the absence of stream segment flow data, calculations of flow conducted by extrapolation methods provided by the United States geological survey;

(C) are actually inhabited by threatened or endangered aquatic species listed in rules and regulations promulgated by the Kansas department of wildlife and parks or the United States fish and wildlife service;

(D) (i) scientific studies conducted by the department show that pooling of water during periods of zero flow provides important refuges for aquatic life and permits biological recolonization of intermittently flowing segments; and

(ii) a cost/benefit analysis conducted by the department and taking into account the economic and social impact of classifying the stream segment indicates that the benefits of classifying the stream segment outweigh the costs of classifying the stream segment, as consistent with the federal clean water act and federal regulations; or

(E) are at the point of discharge on the stream segment and downstream from such point where the department has issued a national pollutant discharge elimination system permit other than a permit for a confined feeding facility, as defined in K.S.A. 65-171d, and amendments thereto.

(2) Classified stream segments other than those described in subsection (a)(1)(E) shall not include ephemeral streams; grass, vegetative or other waterways; culverts; or ditches.

(3) Any definition of classified stream or “classified stream segment” in rules and regulations or law that is inconsistent with this definition is hereby declared null and void.

(b) “Department” means the department of health and environment.

(c) “Designated uses of classified stream segments” shall be defined as follows:

(1) “Agricultural water supply use” means the use of a classified stream segment for agricultural purposes, including the following:

(A) “Irrigation” means the withdrawal of water from a classified stream segment for application onto land; or

(B) “livestock watering” means the provision of water from a classified stream segment to livestock for consumption.

(2) “Aquatic life support use” means the use of a classified stream segment for the maintenance of the ecological integrity of streams, lakes and wetlands, including the sustained growth and propagation of native aquatic life; naturalized, important, recreational aquatic life; and indigenous or migratory semi aquatic or terrestrial wildlife directly or indirectly dependent on surface water for survival. Categories of aquatic life support use include:

(A) “Special aquatic life use waters” means classified stream segments that contain combinations of habitat types and indigenous biota not found commonly in the state, or classified stream segments that contain representative populations of threatened or endangered species, that are listed in rules and regulations promulgated by the Kansas department of wildlife and parks or the United States fish and wildlife service.

(B) “Expected aquatic life use waters” means classified stream segments containing habitat types and indigenous biota commonly found or expected in the state.

(C) “Restricted aquatic life use waters” means classified stream segments containing indigenous biota limited in abundance or diversity by the physical quality or availability of habitat, due to natural deficiencies or artificial modifications, compared to more suitable habitats in adjacent waters.

(3) “Domestic water supply” means the use of a classified stream segment, after appropriate treatment, for the production of potable water.

(4) “Food procurement use” means the use of a classified stream segment for the obtaining of edible forms of aquatic or semi aquatic life for human consumption.

(5) “Groundwater recharge use” means the use of a classified stream segment for the replenishing of fresh or usable groundwater resources. This use may involve the infiltration and percolation of surface water through sediments and soils or the direct injection of surface water into underground aquifers.

(6) “Industrial water supply use” means the use of a classified stream segment for nonpotable purposes by industry, including withdrawals for cooling or process water.

(7) (A) “Recreational use” means:

(i) Primary contact recreational use is use of a classified stream segment for recreation during the period from April 1 through October 31 of each year, provided such classified stream segment (a) by law or written permission of the landowner is open to and accessible by the public and (b) is capable of supporting the recreational activities of swimming, skin diving, water-skiing, wind surfing, boating or mussel harvesting where the body is intended to be immersed in surface water to the extent that some inadvertent ingestion of water is probable;

(ii) Secondary contact recreational use:

(a) is use of a classified stream segment for recreation, provided such classified stream segment (1) by law or by written permission of the landowner is open to and accessible by the public and (2) is capable of supporting the recreational activities of wading or fishing where the body is not intended to be immersed and where ingestion of surface water is not probable; or

(b) is use of a classified stream segment for recreation, provided such classified stream segment (1) is not open to and accessible by the public under Kansas law and (2) is capable of supporting the recreational activities of swimming, skin diving, water-skiing, wind surfing, boating, mussel harvesting, wading or fishing.

(B) If opposite sides of a classified stream segment would have different designated recreational uses due to differences in public access, the designated use of the entire classified stream segment may be the higher attainable use, notwithstanding that such designation does not grant the public access to both sides of such segment.

(C) Recreational use designations shall not apply to stream segments where the natural, ephemeral, intermittent or low flow conditions or water levels prevent recreational activities.

(d) “Ephemeral stream” means streams that flow only in response to precipitation and whose channel is at all times above the water table.

(e) “Secretary” means the secretary of health and environment.

Sec. 2. Notwithstanding any other provisions of law and in addition to the powers of the secretary pursuant to K.S.A. 65-171d, and amendments thereto, the secretary shall establish classified stream segments in Kansas and, following such classification, designate use of such classified stream segments pursuant to sections 3 and 4, and amendments thereto.

Sec. 3. (a) Prior to December 31, 2002, the department shall review all stream segments listed on the 1999 Kansas surface water register and determine whether such stream segments meet the definitions of classified stream segments pursuant to paragraph (a)(1)(A) or (a)(1)(B) of section 1, and amendments thereto. The department shall begin the review with stream segments listed on the 1999 Kansas surface water register west of the 98th longitude line and consider stream flow data or methodologies of extrapolating flow from the United States geological survey.

(b) Prior to December 31, 2005, the department shall review all stream segments listed on the 1999 Kansas surface water register which do not meet the definitions of classified stream segments pursuant to paragraph (a)(1)(A) or (a)(1)(B) of section 1, and amendments thereto,

and determine whether such stream segments meet the definitions of classified stream segments pursuant to paragraph (a)(1)(C), (a)(1)(D) or (a)(1)(E) of section 1, and amendments thereto. The department shall establish a procedure, adopted in rules and regulations, requiring that all of the reviews and findings have been met pursuant to paragraph (a)(1)(D) of section 1, and amendments thereto.

(c) All current stream classifications shall remain in effect until December 31, 2005, or as deleted or changed through the procedures set forth above.

Sec. 4. (a) Prior to October 15, 2001, the department shall make publicly available a listing of all currently classified stream segments for which: (1) Designated use attainability analyses for recreational use have been completed; (2) recreational use has been determined not attainable; or (3) designated use attainability analyses for recreational use have not been completed. For such classified stream segments for which designated use attainability analyses for recreational use have not been completed, the department, at a minimum, shall complete a designated use attainability analysis for recreational use according to the following schedule:

(A) An aggregate of at least 25% of such classified stream segments shall have a designated use attainability analyses for recreational use completed prior to October 31, 2002.

(B) An aggregate of at least 50% of such classified stream segments shall have a designated use attainability analyses for recreational use completed prior to October 31, 2003.

(C) An aggregate of at least 75% of such classified stream segments shall have a designated use attainability analyses for recreational use completed prior to October 31, 2004.

(D) All of such classified stream segments shall have designated use attainability analyses for recreational use completed prior to October 31, 2005.

(b) Prior to October 15, 2002, the department shall make publicly available a listing of all currently classified stream segments for which: (1) Designated use attainability analyses for use other than recreational use have been completed; (2) use other than recreational use has been determined not attainable; or (3) designated use attainability analyses for use other than recreational use have not been completed. For such classified stream segments for which designated use attainability analyses for use other than recreational use have not been completed, the department, at a minimum, shall complete a designated use attainability analysis for use other than recreational use according to a schedule adopted before June 1, 2004, by rules and regulations of the secretary.

(c) Barring flooding or acts of God, which would prevent the department from completing designated use attainability analyses, the schedules provided for pursuant to subsections (a) and (b) shall be accelerated to allow for completion of designated use attainability analyses for all designated uses on or before December 31, 2007.

(d) All current designated uses of classified stream segments listed on the Kansas surface water register 1999 shall remain in effect until December 31, 2007, or until deleted or changed through the procedures set forth above.

Sec. 5. (a) Prior to December 1, 2001, the secretary shall publish as guidance designated use attainability analysis protocols for the revision and adoption of designated uses of classified stream segments to protect the public health or welfare and to enhance the quality of classified stream segments. The secretary shall take into consideration the uses and values of such waters for public water supplies, propagation of fish and wildlife, navigation and recreational, agricultural, industrial and other purposes.

(b) The designated use attainability analysis protocols shall include, if applicable for the respective designated use, procedures for:

(1) Review of physical, chemical, biological and economic and social factors affecting attainment of a use or uses;

(2) review of naturally-occurring pollutant concentrations and conditions affecting attainment of a use or uses;

(3) review of natural, ephemeral, intermittent or low flow conditions or water levels affecting attainment of a use or uses;

(4) review of human conditions that prevent attainment of a use or uses, including state laws, and that cannot be remedied or that would cause more damage or an inproportionate cost to remedy than to leave in place;

(5) review of hydrologic modifications such as dams and diversions affecting attainment of a use or uses;

(6) review of physical conditions related to natural features such as lack of proper substrate, cover, flow, depth, pools, riffles and other stream morphology affecting attainment of a use or uses;

(7) identification and description of cost-effective and reasonable best management practices for non-point source pollutant control where such control would be needed to attain a use or uses; and

(8) qualified persons outside the department to conduct designated use attainability analyses.

(c) A use or uses shall not be designated unless it is demonstrated that such use or uses are actually existing and attainable, or unless it is demonstrated that the adverse social and economic impacts of designating a use or uses that are not actually existing are outweighed by the social and economic benefits resulting from the attainment of such use or uses.

(d) Within 60 days after receipt of submission of a use attainability analysis, the department shall review and provide a written determination of whether the documentation submitted is complete.

(e) Within 60 days after receipt of submission of a complete use attainability analysis, the department shall review and provide a written determination of whether revision of the designated use will be proposed as a rule and regulation. Any person aggrieved by such determination may make written request, within 30 days after receipt of such determination, for a meeting with the secretary or the secretary's designee to discuss the determination and exchange information.

(f) All proposed revisions to the surface water register shall be proposed for adoption in accordance with the rules and regulations filing act (K.S.A. 77-415, and amendments thereto).

(g) Following the promulgation of a revision of the surface water register as a rule and regulation pursuant to subsections (d) and (e), any person aggrieved by such promulgation, within 15 days after publication of the rule and regulation, may request a hearing by filing an application for an order under the Kansas administrative procedure act. Any action of the secretary in a proceeding pursuant to this subsection is subject to review in accordance with the act for judicial review and civil enforcement of agency actions.

(h) The Kansas surface water register shall be updated and published annually.

Sec. 6. (a) Annually, on or before the first day of the legislative session, the secretary shall prepare and submit a report to the governor and the chairperson, vice-chairperson and ranking minority member of the standing committees of the house of representatives and the senate on environment and natural resources regarding the status of completing the classification of streams as required in section 3, and amendments thereto, and designated use attainability analyses as required in section 4, and amendments thereto.

(b) On or before February 15, 2003, the secretary shall report to the governor and the chairperson, vice-chairperson and ranking minority member of the standing committees of the house of representatives and the senate on environment and natural resources regarding the status of new methodologies of measuring stream flow, in particular that under development by the United States geological survey.

Sec. 7. Subject to appropriations, there shall be an additional employee at the state conservation commission to work on total maximum daily load compliance and to coordinate with the department and other appropriate federal and state agencies to further implement voluntary incentive based conservation programs to protect water quality.

Sec. 8. Nothing in this act shall be construed to:

(1) Require the secretary to designate the use of any classified stream as secondary contact recreational use pursuant to subsection (c)(7)(A)(ii)(b) of section 1, and amendments thereto; or

(2) authorize public access to private property unless such public access is otherwise authorized by law or by written permission of the landowner.

Sec. 9. If any provisions of this act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provisions or application. To this end the provisions of this act are severable.

Sec. 10. This act shall take effect and be in force from and after September 1, 2001, and its publication in the statute book.

I hereby certify that the above BILL originated in the
SENATE, and passed that body

SENATE concurred in
HOUSE amendments _____

President of the Senate.

Secretary of the Senate.

Passed the HOUSE
as amended _____

Speaker of the House.

Chief Clerk of the House.

APPROVED _____

Governor.